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under s. 144 as well as under s. 151, Harishchandra J. has dissented from the view taken by the Calcutta and the Nagpur High Courts and has observed that an order for restitution passed under s. 151 was not appealable.

In the result, the revisional application fails and the rule is discharged with costs.

Rule discharged.

G. N. V.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

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PANNALAL NANDLAL BHANDARI OF INDORE, APPLICANT *v.* THE
COMMISSIONER OF INCOME-TAX, BOMBAY CITY, BOMBAY.*

I

Indian Income-tax Act (XI of 1922), ss. 22 and 34—Assessee non-resident during years of account relevant for years of assessment—Public notice under s. 22 (1) given but no individual notice under s. 22 (2) served on assessee—Notice under s. 34 read with s. 22 (2) served on assessee—Whether such notices within period of limitation?

The word 'omission' in s. 34 (1) (a) of the Indian Income-tax Act, 1922, unlike the word 'failure' merely refers to the not doing of a thing, whether the law casts upon the assessee an obligation to do it or not. Where an assessee does not in fact make a return under s. 22 of the Act, his case falls under s. 34 (1) (a) which provides a period of eight years for service of notice under s. 34 read with s. 22 (2) of the Act.

The constructive notice under s. 22 (1) operates whether the notice was in fact read by the person sought to be affected by the notice, or whether such person had in fact the opportunity of reading it. If the prescribed notice is given, in law the notice is deemed to have been actually served upon the person affected by it. Whether he is a resident or non-resident, such notice is sufficient notice and casts an obligation upon the assessee to make a return.

Whitney v. Commissioner of Inland Revenue,⁽¹⁾ referred to.

It being well settled that the Indian Legislature has the competence to tax non-residents, legislation cannot be challenged on the ground of extra-territoriality.

Pannalal Nandlal Bhandari of Indore, assessee, is a Hindu undivided family and was non-resident in the years of account relevant for the assessment years 1943-44, 1944-45, 1946-47 and 1947-48. The assessee had not made return for these years though public notices for the respective years were duly given under s. 22 (1) of the Indian Income-Tax Act, 1922. No individual notices under s. 22 (2) of the Act were served on the assessee.

*Income-tax Reference No. 5 of 1955.

1. (1925-26) 10 T. C. 88.

for any of these years. Thereafter notices under s. 34 read with s. 22 (2) of the Act were served on the assessee for these years and orders of assessment were passed against the assessee as shown in the following table:

Assessment year.	Date of Issue of Notice.	Date of Service.	Date of assessment.
1943-44	14-3-1952	27-3-1952	6-5-1953
1944-45	6-2-1953	16-2-1953	6-5-1953
1946-47	30-3-1951	4-4-1951	19-3-1952
1947-48	27-3-1952	2-4-1952	6-5-1953

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It was contended by the assessee that the assessee's case was governed by s. 34 (1) (b) and not s. 34 (1)(a) of the Act and that, therefore, notices under s. 22 (2) read with s. 34 were served on the assessee beyond the period of limitation prescribed by s. 34 of the Act. The Income-tax Appellate Tribunal negatived the contention. At the instance of the assessee, the following questions were referred to the High Court at Bombay:—

(1) Whether notices issued under s. 22 (2) of the Act read with s. 34 of the Act for the assessment years 1943-44, 1944-45, 1946-47 and 1947-48 were served after the period of limitation prescribed by s. 34 (1) of the Act?

(2) If the answer to question No. 1 is in the affirmative, whether the assessments for the years in question were invalid in law.

N. A. Palkhivala with S. P. Mehta, and Mr. E. J. Writer for the Applicant.

G. N. Joshi with M. P. Amin, Advocate General for the Respondent.

Chagla C. J.—The question that arises on this reference is a question of limitation and what was contended by the assessee was that certain notices served by the Income Tax Officer under s. 22 (2) of the Act read with s. 34 were out of time and therefore the assessment pursuant to these notices was invalid in law.

The two rival contentions we have to consider are, one that the period of limitation is eight years as contended by the department and the other is that the period of limitation is four years as contended by the assessee, and turning to s. 34 the period of limitation would be eight years if the case falls under s. 34 (1)(a) and the period of limitation would be four years if the case falls under s. 34 (1)(b).

A case falls under s. 34 (1)(a) if there is an omission or failure on the part of the assessee to make a return of his income under s. 22; and admittedly in this case the assessee has made no return of his income under s. 22. Section 34 (1)(b) applies where there has been no omission or failure as mentioned in cl. (a), in other words, where the assessee has made a return and the conditions laid down in sub-cl. (b) are satisfied.

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The first contention of Mr. Palkhivala is that the case does not fall under sub-cl. (a) because there has been no omission or failure on the part of the assessee and this contention is based on this that there was a public notice given under s. 22 (1), that there was no individual notice under s. 22 (2), that the public notice did not bind the assessee and that there was no obligation on the part of the assessee in response to the public notice to make any return and therefore there was no omission or failure on the part of the assessee as contemplated by s. 34 (1)(a).

The Legislature has advisedly used two expressions "omission" and "failure" on the part of the assessee. Failure must connote that there is an obligation which has not been carried out and if there was no obligation upon the assessee to make a return then it would not be a failure on his part to carry out that obligation. But the Legislature has also used the expression "omission", and it is clear that the expression "omission" does not connote any obligation as the expression "failure" does. "Omission" is a colourless word which merely refers to the not doing of something, and if the assessee in fact does not make a return, it is an omission on his part, whether the law casts any obligation upon him to make a return or not, but as the matter is of some importance we have considered Mr. Palkhivala's contention that under s. 22 (1) if there is a public notice issued by the Income Tax Officer, that notice under the sub-section does not bind the assessee and there is no obligation upon the assessee to make a return. It is said that as the assessee in this case admittedly was a resident of Indore, he was a non-resident and at the material dates he was a foreigner and therefore an obligation can only be cast upon him to make a return provided an individual notice was served upon him under s. 22 (2). Section 22 (1) provides for a constructive notice. If a notice is given in the manner prescribed under s. 22 (1) then whether there is an actual notice or not, in the eye of the law there is a constructive notice and therefore it is futile to consider whether the person to whom this constructive notice has been given had an opportunity of reading the notice or not. It is said that a foreigner should not be expected to read a notice given in a newspaper in India. Could a resident be heard to say that he had no notice under s. 22 (1) because he had no opportunity of reading the notice either because he did not read the particular newspaper or that he was not in India or for any other ground? If such a plea could not be made by a resident, it is difficult to understand why such a plea is permitted to a non-resident. The constructive notice prescribed by a statute does not consider at all whether in fact the notice was read by the person sought to be affected by the notice or even whether the person sought to be affected

by the notice had an opportunity of reading the notice. If the conditions laid down in the statute are satisfied, the law looks upon the notice as being actually served upon the person affected by the notice. Therefore whether the person is a resident or a non-resident, if the notice is given as prescribed under s. 22 (1), it is sufficient notice which casts an obligation upon the assessee to make a return.

Mr. Palkhivala relied on the judgment of the House of Lords in *Whitney v. Commissioner of Inland Revenue*.⁽²⁾ In that case the House of Lords was considering an actual notice served upon the assessee who was a foreigner resident in the United States of America, and the question that arose for determination of the learned Law Lords was whether a notice could be served out of jurisdiction to bind a foreigner, and the majority of the Law Lords held that such a notice could be served, that a return of super tax could be called for, and in the absence of such a return the best judgment assessment could be made. Viscount Cave, L.C. dissented from the judgment and there is not much point in referring to the judgment of Viscount Cave, L.J. on this point because his view of the law did not prevail, but we do not find any discussion in this judgment drawing any distinction between an actual notice and a constructive notice. In principle there can be no difference. A statute may provide for actual notice or it may provide for constructive notice. If according to the House of Lords an actual notice calling for a return could be served upon a foreigner there is no reason why a constructive notice provided by a statute should not have the same effect.

The final argument urged by Mr. Palkhivala is that s. 1 (2) of the Income Tax Act extends the Act to the whole of India, and as the assessee was outside India as India was understood then, he was resident of an Indian State, the provision with regard to s. 22 has no application to a non-resident. The contention is obviously untenable. It is now well settled law that Indian Legislature has the competence to tax non-residents and the Legislation cannot be challenged on the ground of extra-territoriality. If the Legislature has the power to tax a non-resident, surely it has the power which is not of such a wide nature of making a provision for the issue of a notice which would bind a non-resident. In our opinion, therefore, the case falls under s. 34 (1)(a), the period of limitation is eight years and if this is the period of limitation there is no dispute that the notices were issued in time and the assessments were completed in time and the assessments were valid and binding.

Our answers to the questions submitted to us will be:

- (1) In the negative.
- (2) Does not arise.

The assessee to pay the costs.

II

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Indian Income-tax Act (XI of 1922), s. 66—Reference to High Court by Income-tax Appellate Tribunal of certain questions—Refusal by Tribunal to raise additional question—Notice of Motion for directing Tribunal to refer such additional question—Such motion taken out after expiring of six months of service of order of Tribunal—Whether such notice of motion within time?

The order of the Income-tax Appellate Tribunal refusing to refer an additional question of law was passed on December 24, 1954 and served on the assessee on January 11, 1955. The assessee moved the High Court at Bombay by a Notice of Motion on July 25, 1955 for an order directing the Tribunal to raise the additional question of law mentioned in the notice. At the hearing of the motion, a preliminary objection was taken that the motion was barred by limitation.

Held, that the motion was barred by limitation as it was taken out after expiry of six months from the date on which the assessee was served with the notice of refusal.

The power of the High Court to correct the Tribunal is the same whether the Tribunal refuses to state a case altogether or states a case referring a question or questions of law but refuses to state a question suggested by the assessee. The period of limitation for moving the High Court to direct the Tribunal to raise questions of law is the same in either case.

Mahabir Prasad Niranjantal v. Commissioner of Income-tax,⁽³⁾ dis-sented from.

Khandwalla v. Commissioner of Income-tax,⁽⁴⁾ referred to.

N. A. Palkhivala with S. P. Mehta and E. J. Writer for the Applicant.

G. N. Joshi, for the Respondent.

Chagla C. J.—A notice of motion has been taken out by the assessee in this reference for directing the Tribunal to raise an additional question of law, and a preliminary objection is taken by Mr. Joshi on behalf of the Commissioner that the notice of motion is barred by limitation.

The order in respect of which the additional question of law is sought was passed on December 22, 1954, and the order was served upon the assessee on January 11, 1955, and the notice of motion is taken out on July 25, 1955. Clearly the notice of motion has been taken out more than six months after the service of the order and Mr. Joshi's contention is that the period of limitation is laid down in s. 66 (2) and by reason of that period of limitation the notice of motion is barred.

Section 66 (2) deals with a case where the Appellate Tribunal refuses to state a case on the ground that no question of law arises, and it gives a right to the assessee or the Commissioner, as the case may be, to apply to the High Court, and if the High Court is not satisfied as to the correctness of the decision of the Appellate Tribunal the High Court may require the Appellate Tribunal to state the case and refer it; and this power

3. [1951] 20 I. T. R. 472.

4. [1946] 14 I. T. R. 635.

can only be exercised within six months from the date on which he, i.e., either the assessee or the Commissioner, is served with the notice of the refusal.

The contention of Mr. Palkhivala is that s. 66 (2) only applies where the Appellate Tribunal refuses to state a case in the first instance, but if the Appellate Tribunal states a case and refuses to state a case with regard to some additional question of law then s. 66 (2) has no application. It is difficult to understand why that interpretation should be put upon s. 66 (2). Section 66 (1) deals with a statement of case by the Appellate Tribunal and s. 66 (2) deals with a case where the Tribunal refuses to state a case. It may state a case with regard to one question of law, it may refuse to state a case with regard to another question of law suggested by the assessee on the ground that no question of law arises, and the power of the High Court is to correct the Tribunal when it wrongly comes to the conclusion that no question of law arises and that power of correction is the same whether the Tribunal refuses to state a case altogether or having stated a case refers only one question of law and not another which is suggested by the assessee. Both sub-s. (1) of s. 66 and sub-s. (2) of s. 66 are comprehensive and they deal with two different sets of circumstances. To suggest that s. 66 (2) has no application because a case has been stated and the Tribunal refuses to refer an additional question of law suggested by the assessee is to ask us to come to the conclusion that it is open to the assessee, once a case has been stated, at any time to apply to the High Court to direct the Tribunal to raise an additional question of law. In other words, the Legislature deliberately and advisedly fixed no period of limitation with regard to an application to be made by an assessee in a case where a case has been stated by the Appellate Tribunal. In our opinion there is no warrant whatever for reading s. 66 (2) in that restricted fashion.

It may be pointed out that it has been a settled practice of this Court, which practice is not disputed by Mr. Palkhivala, that a notice of motion, whether taken out by the Commissioner or an assessee, if taken out six months after the date on which the order was served upon either party, is dismissed on the ground of limitation, and there has never been any suggestion that that practice was not a proper practice or was not justified by the provisions of s. 66 (2). Mr. Palkhivala now relies on a recent decision of the Allahabad High Court which is reported in *Mahabir Prasad Niranjnlal v. Commissioner of Income tax*.⁽⁵⁾ In that case an application was made by the assessee for referring certain other question which arose out of the order of the E. P. T. Appellate Tribunal which had not been referred by the Tribunal, and the view taken by the

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Allahabad High Court was that such an application fell not under s. 66 (2) but under s. 66 (4). With very great respect, it is difficult to understand how s. 66 (4) can possibly apply to a case where an assessee is aggrieved by the decision of the Tribunal to refuse to refer additional question of law arising out of its order. Sub-section (4) of s. 66 undoubtedly confers very wide powers upon the High Court, but those powers are exercised by the High Court *suo motu* and they are exercised when the High Court is not satisfied that the statements in a case referred under s. 66 are sufficient to enable it to determine the question submitted to it. Therefore the High Court itself must feel that the statement submitted is not a proper statement, and it is perfectly true that for that purpose the High Court may frame a proper question and modify or vary a question raised by the Tribunal and ask the Tribunal to submit a proper statement, but there must be a connection between the question raised by the Tribunal and the further statement called for by the High Court under this section, because the operative words of sub-s. (4) are that the High Court must not be in a position to determine the question raised by the Tribunal. Now, when an assessee wants to raise an additional question of law it is difficult to understand how the Court is concerned with that question under sub-s. (4) of s. 66. Therefore the only proper sub-section under which the assessee can make such an application is under s. 66 (2). Undoubtedly if the present case fell under s. 66 (4), there is no period of limitation, and advisedly the Legislature did not impose any limitation upon the powers of the High Court to call for a further or additional statement from the Tribunal. But a period of limitation was laid down when an application had to be made by the party himself. Therefore we are unable to agree, with respect, with the Allahabad High Court that an application by an assessee to the High Court for a direction upon the Tribunal to raise additional questions of law is an application that falls under s. 66 (4).

The Allahabad High Court in its judgment has referred to the case of *Khandwalla v. Commissioner of Income Tax*⁽⁶⁾ and the learned Judges have taken the view that the point that arose before them and which they decided about limitation is covered by this decision. When we turn to that judgment, it lays down the practice that must be followed when an assessee wishes the Tribunal to raise additional questions of law, and the practice that was laid down by Sir Leonard Stone and Justice Kania, as he then was, was that a notice of motion must be taken out by the aggrieved party and the proper time for the aggrieved party to bring to the notice of the Court that certain further and other facts were necessary to be stated or certain further or other questions of law be raised and brought

up for decision by the Court is the time when the reference comes up before the Court, and that this notice of motion should be heard along with the reference. But the learned Judges did not consider at all what was the period of limitation within which the assessee should take out such a notice of motion or should ask the Court to direct the Tribunal to raise additional questions of law. There is no discussion whatever with regard to the question of limitation, and very likely it is for very good reason, because even in 1946 the practice was well settled that such a notice of motion taken out by the assessee must be brought within six months from the date of the service of the order upon him. Therefore, again with respect to the Allahabad High Court, we do not understand how the judgment in *Khandwalla's* case can be looked upon as an authority for the proposition that there is no period of limitation laid down for making an application for directing the Tribunal to raise additional questions of law. In our opinion, therefore, the present notice of motion is an application which falls under s. 66 (2) and the period of limitation is six months from the service of the order and the notice of motion is therefore barred by limitation.

The result is that the notice of motion must be dismissed on the ground that it was barred by limitation. It is therefore dismissed with costs.

Attorneys for Applicant: *S. P. Mehta.*

Attorneys for Respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar.

SHIVRAM GOVIND DARSHANE AND OTHERS, APPLICANTS (ORIGINAL PLAINTIFFS) *v.* VISHWANATH GOVIND DARSHANE OPPONENT (ORIGINAL DEFENDANT).*

Indian Contract Act (IX of 1872), ss. 23, 218—Illegal agreement to withdraw Criminal prosecution for burning house on payment of compensation by accused—Compensation received from the accused by a member of the family whose house was burnt—Whether other members entitled to a share in the compensation.

An agent receiving moneys for and on behalf of his principal under an illegal agreement is accountable to his principal under s. 218 of the Indian Contract Act.

*Civil Revision Application No. 267 of 1954.

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